MAHABIR PRASAD v. MAHABIR PRASAD

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) November 19 & 25, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 203 of 1981]

Family Law — Custody of infants — Welfare of children "first and paramount consideration" — Best interests of children — Other considerations subordinate — Whether status quo must always be preserved — Guardianship of Infants Act, 1961, ss. 5 & 13.

The appellant had applied for the custody of his two infant daughters, aged 7½ years and 8½ years respectively. The appellant was a Malaysian citizen while the respondent, the mother of the children, was an Indian citizen. They were married in Bombay in 1972 and the infants were born there. The appellant left India in 1974 but the mother and the infants remained and lived in India, until 1978, when they came to Malaysia. In January 1980 the marriage broke down. The parties entered into a deed of separation by which custody of the infants was given to the father, the appellant. The respondent returned to India and subsequently filed a divorce petition for the dissolution of the marriage and also applied for the custody of the infants. The appellant was represented at the hearing. The Bombay court made an interim order granting custody of the infants to the mother pending the trial of the divorce petition. The appellant undertook to produce the infants on the date fixed for hearing but he failed to do so, and the Bombay Court granted an order of dissolution of the marriage on the ground of cruelty and awarded custody of the infants to the mother. The appellant applied for custody of the infants in the High Court, Kuala Lumpur but his application was dismissed as the learned Judge was of the view that the appellant was estopped from making the application in view of the decision of the Bombay Court. On appeal to the Federal Court it was ordered that the proceedings be remitted for re-hearing before another judge — see [1981] 2 M.L.J. 326. The present proceedings were then brought before the High Court.

Ajaib Singh J. held that from all angles it was in the best interest and welfare of the children that they live with their mother in India and therefore the application of the appellant for the custody of the two children was dismissed and custody granted to the respondent.

The appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) the welfare of the children must be the first and paramount consideration in such cases and other considerations must be subordinate;

(2) in this case the learned judge took the correct approach in giving the overriding consideration of the welfare of the children upper most in his mind;

(3) from the evidence placed before the court it cannot but be for the children's interests and welfare that they be returned to the mother.

Cases referred to:-

(1) *Mahabir Prasad* v. *Mahabir Prasad* [1981] 2 M.L.J. 326.

(2) *J. & Anor.* v. *C. & Ors.* [1970] A.C. 668, 710-711.

(3) *Teh Eng Kim* v. *Yew Peng Siong* [1977] 1 M.L.J. 234, 239.

HIGH COURT.

Dr. L. Fernando (*Miss V. Alahakone* with him) for the plaintiff.

K. Anantham for the defendant.

Ajaib Singh J. (delivering interim order on September 30, 1981): I have decided to make an interim order today and defer my final decision for two weeks.

The parties in this custody case have filed lengthy affidavits and I have also received at my request a confidential report from the social welfare officer which covers the plaintiff, his two children and other members of the plaintiff's family who live with him in Ipoh. This report does not say much about the mother of the children because the social welfare officer had no opportunity to interview her as she was away in India.

I feel that I need more time and more information in this matter before I make a final decision. I am concerned about the welfare of the two children as it is the function and duty of the court to look into the interest and welfare of infant children who are innocent victims of broken marriages. It is for this reason that I have decided to obtain more evidence and take some time to arrive at a considered judgment.

To get a complete picture of this unhappy episode it is necessary that the social welfare officer puts up a report on the mother of the children. The first report has made certain observations on the two children who were then and are still living with the father. It is only fair therefore that an opportunity should now be created to allow the children to be with their mother for some time so that the social welfare officer while preparing his report on the mother will be able to make his observations on the children again and at a period of time when they will be living with their mother.

I must add here that the observations and recommendations which the social welfare officer submits in a case like this are certainly taken into consideration by the court but the question of the custody of infant children rests entirely with the court and the court alone.

I shall therefore make an interim order in this case. The mother will have custody of the children for two weeks. The Senior Assistant Registrar of the High Court will arrange for the mother and the two children to be interviewed by the social welfare officer who will submit a confidential report to the court. And during the fortnight I shall myself talk to the two children privately in chambers to ascertain their desires as far as I can possibly do bearing in mind their tender ages.

I shall give my final decision on October 16, 1981 at 10.00 a.m.

Ajaib Singh J.: These custody proceedings relate to two infant girls — Panna aged 7½ years and Dhanwanti aged 8½ years — the innocent victims of a broken marriage.

The background of this case may be briefly stated. The plaintiff was born in India in 1950 and in 1959 he migrated with his father to Malaysia where he had his primary and secondary education. In 1971 he went to Bombay for further studies and after obtaining a diploma in accountancy he returned to Malaysia in 1975 and assisted his father in the laundry business for about one and a half years. After that he was employed as an account clerk by an industrial firm and from March 1981 he has been working as an audit clerk with another firm drawing a salary of $350.

While studying in Bombay he got married to the defendant on March 12, 1972. Dhanwanti and Panna were born in Bombay on February 1, 1973 and February 9, 1974 respectively. When he returned to Malaysia

in August 1975 the plaintiff left behind the defendant and the two children who lived with the defendant's parents in India until October 21, 1978 when she and the children joined the plaintiff in Malaysia. On November 15, 1978 the parties had their marriage registered under the Registration of Marriages Ordinance 1952. The Immigration Department gave visit passes to the defendant and the two children which were extended from time to time. The family lived together with the plaintiff's aged parents (the father 63 years of age and the mother 56) and with the plaintiff's brother who is a student, two grown-up sisters both unemployed and another grown-up sister who works as a nurse in a private hospital. Differences arose in their matrimonial home and the defendant left Malaysia after signing a deed of separation on January 14, 1980. In this deed she had *inter alia* agreed that the plaintiff should at all times have the sole custody, upbringing, guardianship and education of the two children during their minority and that she herself would not in any way interfere in this regard and also that she shall have no right of access to the children.

Some three months later the defendant filed divorce proceedings in Bombay. The plaintiff engaged counsel to contest the petition and pending its hearing the Bombay Civil City Court made an interim order giving custody of the children to the defendant. The plaintiff who was present in court in Bombay gave an undertaking to the court to produce the children on the date fixed for the hearing of the petition and an order to that effect was made by the court. However the plaintiff failed to appear in court or produce the children on the appointed date whereupon the court after hearing the defendant on oath found the plaintiff guilty of the matrimonial offence of cruelty and ordered dissolution of the marriage. Custody of the children was given to the defendant. That was on December 16, 1980. And just one day before that date the plaintiff filed this present originating summons praying for an order that the custody of the children be given to him.

The parties have filed lengthy affidavits in these proceedings. The plaintiff has set out the fact of his marriage to his wife, the birth of the two children in India and has referred to the deed of separation. He also states that the two children have been in his custody and upbringing from the time that their mother left Malaysia for India and that the older child is now in Std. II and the younger in Std. I. He states that both his children have expressed their strong desire to remain in Malaysia under his guardianship and custody.

In his first affidavit the plaintiff made no mention whatsoever of the divorce proceedings that had been going on in India. But he explains this in one of his later affidavits. He admits that he had breached his undertaking which he had given to the Bombay court by not producing the children but states that he decided upon this course after much deliberation and after having been advised that if he took the children out of the jurisdiction of the courts in Malaysia the children would lose their only right to Malaysian residence. His actions he states were governed with the paramount interest of the children in mind. He says that although he is not a wealthy man he is able to provide for his children for their necessities and that he believes that Malaysia would provide a better environment for the children to grow up with ample safeguards for their safety, protection and welfare in any contingency. In addition to his salary he also receives every month a sum of $250 as an allowance from the laundry business and $210 as rental from a terrace house which he owns.

The defendant was a divorcee when she married the plaintiff and has a son (now aged 13 years) from the previous marriage. The plaintiff says —

> "The defendant will wholly rely on her father for support of the children from her two marriages: her son from her first marriage who is about thirteen (13) years of age now, and my two children. The defendant does not say how she proposes to look after my children's best interests and welfare in the context of a step brother/step sisters situation. This is a situation notoriously difficult for the children and even for a fair-minded adult, as the burden on the defendant would be even heavier considering that her son by her first marriage suffers from poor health and needs special attention. I summit it would be grossly unfair to subject my children to such a context, when an alternative, tranquil arrangement already exists. It is further a matter of grave anxiety to me that the defendant has seen fit to say nothing about this to this Honourable Court."

The plaintiff has exhibited a page from a letter written to him by the defendant when she was with her children in India. In this letter the defendant says that the children "are not safe here." The defendant's explanation is that the letter was written "when my father was seriously ill and the word "safe" was used in the context of there being no male around the house to look after the children if anything should happen to my father."

It sounds a little strange that only one page of the letter was exhibited. Was the plaintiff trying to hide something which may not have been to his advantage or which may have been to his disadvantage? No reason was given as to why only one page and not the whole letter was exhibited.

The defendant in reply has set out the history of the proceedings in the court in Bombay. She states that the plaintiff is estopped from making this application by reason of his submission to the jurisdiction of the Indian court on the question of the custody of the children which is the very issue before the Malaysian court. The decision of the Indian court is final and conclusive. She states that the plaintiff is also in contempt of the Indian court by not complying with his undertaking to produce the children in the Indian court and she says that this material non-disclosure by the plaintiff in the present proceedings reflects poorly on his credibility. She then states that the children's interest and welfare will be best served if custody is granted to her. They are both females of tender age, were born and attended school in India and had been living with her until they joined the plaintiff in October 1978. She has also made arrangements for their admission to school upon their return to India. Her father is a well-to-do business man having a spacious flat in Bombay and she herself earns an income of Rs. 1,200 per month as a stenographer. She had taken this job to occupy her mind but she

is now prepared and can afford to leave it and look after the children. She is the only child of her father and will inherit his property which includes shares and partnerships in business concerns and the ownership of a factory. The father's elderly and unmarried sister also owns a factory and this too will pass to the defendant in due course.

The defendant admits signing the deed of separation but says that she was under considerable mental strain and stress at the time of the execution of the deed and therefore she claims that the deed is not legally binding on her. She has given instances of mental cruelty by the plaintiff and members of his family and said that they were all bent on getting rid of her. She says —

"Being in a foreign land and not familiar with its people, custom nor in a position to obtain independent legal advice, I was totally dependent on the plaintiff and his family on all matters. The plaintiff and the family having driven me to a state where return to my own country was the only alternative, then, insisted that they will only allow me to return to India and make the necessary financial arrangements for the same if I was prepared to sign an Agreement leaving the children in this country. Being in the miserable state I was and desperate to avoid the further ignominy of living with my in-laws, I signed the Deed of Separation.

I say that in anticipation of getting rid of me alone without the children, which I never suspected then, the plaintiff and the family members required me to surrender my consolidated passport with the children and thereafter got the passport bifurcated and separate passports were issued for myself and my two children."

Upon her return to India she sought legal advice and thereafter filed her petition for divorce and for custody of the children in March 1980. She disputes the contention of the plaintiff that the children have expressed their strong desire to remain in Malaysia under his guardianship and custody. She says that the children have obviously been brain-washed and will want to live with her once access and custody is granted to her.

There appears to be some truth in the allegations by the defendant that she was ill-treated by the plaintiff and his parents and sisters. She has exhibited copies of her letters written to her parents in India during the years when she was living with the plaintiff in Ipoh. Also exhibited are the air-mail covers of some of those letters. In these letters she has mentioned about the neglect and the ill-treatment afforded to her by the plaintiff and members of his family. These letters were written at a time when she was not contemplating any divorce or custody proceedings and therefore it cannot be said that she concocted the allegations of ill-treatment with a view to using the letters as evidence in her favour at some later stage.

Extracts from these letters are as follows —

28.6.79 — Letter by defendant addressed to her parents:

"Dad,

Please get me out of here.... Sometimes in solitude I cry bitterly wondering how I managed.... Mostly there is misunderstanding caused by my mother-in-law and sisters-in-laws. They are the worst."

24.7.79 — Letter by defendant addressed to her mother:

"Mom,

On receipt of this letter please arrange to send dad here. Mom, I cannot bear it any more here. It is just work the whole day from 5.00 a.m. to 10/11 p.m.... On top of this Prasad always fights with me. I cannot bear the physical and mental cruelty any more. Mom, let me come back to you soon. I miss you, dad and pappu very much.... Mom, please send Pop to take me back."

16.9.79 — Letter by defendant to her parents:

"Dad,

It is becoming worse day by day, physically and mentally. I have become thin. None of my blouses fit me. My back and shoulder blades pain due to the twenty-four hours' work and the cold early morning air. All the veins have come up on the legs and hands. Mentally also my mother-in-law and No. 1 and No. 3 sisters-in-law harass me saying cruel things and taunt me. The worst is the mother-in-law.... Also I have come to know that his parents want him to re-marry a girl of their choice. I told him that if such a step is taken I will not stay in the house to do seva (service).... Dad, please come soon. Only you can take me away. This is a man's job. It is no use sending Mom. She will only make matters worse. ... Please I beg of you and Mom and fall on your feet to come soon and take me away from this hell otherwise I promise on your head I will commit suicide....

P.S.: I wrote this above letter last night and today morning there was a big fight with all three sisters-in-law. I just went on listening to their taunts and making fun of me.... I can only pray to God to send you soon and also I know if not now after 1 or 2 or 5 or 10 years God will give them badla (punishment)."

9.11.79 — Letter by defendant addressed to her parents:

"Dad, Mom,

Please help me. I cannot take this treatment here any more. I cannot take this physical and mental cruelty. There are taunts very day. A few days back only Prasad hit me so badly that till today due to this and due to cold and hard work my right shoulder blade is swollen."

Now I do not for a moment say that the allegations which the defendant has made in her letters to her parents are the entire truth or that the defendant herself is altogether free from blame over the misunderstandings which have occurred in the matrimonial home. Yet there appears to be some element of truth in what the defendant has written in her letters bearing in mind that she was living with her mother-in-law and three grown-up sisters of the plaintiff as well as his brother and father in a foreign land with no other relatives of her own in Malaysia.

This case has come up before me by way of a re-hearing as ordered by the Federal Court. The question of estoppel, the effect of the order of the Bombay court and the jurisdiction of the Malaysian courts have all been dealt with by the Federal Court. In delivering the judgment of the Federal Court[1] Raja Azlan Shah Ag. L.P. said —

"The learned judge was of the view that the father was estopped from making the present application stating that the decision of the Bombay Court was conclusive as against the father and it was not open to him to ask for another order in this court on the same matter in which he had agreed to accept the decision of the Bombay Court.

In a case of this nature the courts in this country have jurisdiction to hear a custody case. The High Court in hearing a custody case regarding infants within jurisdiction is invested with an inherent jurisdiction which is derived from the Crown's prerogative powers as *parens patriae*. The problem which this court has to face in circumstances of this kind is not new and the question to be asked is from what angle ought we to approach the case, and how far is there any restriction imposed upon the course which we should take by reason of the order of foreign court of competent juris-

diction granting custody to the mother? There are many well known cases on the subject and we think we need only refer to the Privy Council decision of *McKee* v. *McKee* [1951] A.C. 352 which was cited to the learned trial judge where the Judicial Committee re-affirmed that the infant's welfare is of paramount consideration and that the court in whose jurisdiction the children happens to be should give effect to the foreign judgment without further enquiry only when it is in the best interest of that infant that the court should not look beyond the circumstances in which the foreign jurisdiction was invoked. It is the law of this country as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication. Consequently, although our courts must take into consideration the order of a foreign court of competent jurisdiction, we are not bound to give effect to it if this would not be for the infant's benefit. We cannot regard that order as rendering it in any way improper or contrary to the comity of nations if the courts in this country consider what is in his best interest. Such an order cannot from its nature be final or irreversible. It is only of persuasive authority."

The question for my determination now is: who should get the custody of the children — the plaintiff father or the defendant mother? It is well established that in an application for the custody of a child the court will in exercising its discretion regard the welfare of the child concerned as the first and paramount consideration. It is equally established that this does not mean that the court will not take other relevant factors into consideration. Indeed in order to decide on the question of the welfare of an infant as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his wishes as far as they can be ascertained depending on the age of the child, the confidential reports which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. But always it is the welfare of the child which is of paramount importance.

I have given my most anxious and careful consideration in arriving at a final decision. In a sense it is the future of these two very lovable and charming kids which is at stake through no fault of their own. I have gone through the lengthy affidavits and documents which the parties have filed in these proceedings as well as the two confidential reports put up by the social welfare officer. I have talked to the children privately in chambers to ascertain their wishes. They like their mother but they certainly do not dislike their father. They want to live with their mother and go to Bombay and be with their "doggie." Yet they remember Ipoh not without some fondness. Both the parents love the children immensely and to gain their custody each of them has fought it out in the courts in India and Malaysia bitterly and with the utmost tenacity.

To give one child to each parent is out of the question. The girls are so much attached to each other that it will be cruel to separate them. They must live together with their mother or with their father. I know how hurt and disappointed one parent is going to be at the end of the day. And it is by no means an easy task for me also to say who should get custody of the two children. Custody cases are always distressing but this one is much more so with the love and emotions of the parents and their children running extremely high. But I have a duty to perform and arrive at a decision however hard it may be on one party. At a time like this justice really is blind and unemotional.

In all the circumstances of this case I have come to the conclusion that it is in the best interest, welfare and happiness of the two children that they should live with their mother. On the evidence before me I am satisfied that the mother is in a far better position than the father to bring up the children in India. The infants are females of tender age and they need the care and affection of their mother as they grow up. The mother is financially sound and is in a good position to provide all amenities and necessities for her children and give them a good education. The children have lived in Bombay for a few years and will be able to adjust themselves easily to the Indian way of life.

The plaintiff on the other hand will not be able to provide all that much. His income is not very high and he shares accommodation with six members of his family. His conduct leaves much to be desired. He had promised to produce the children in Bombay and to be present there personally for the hearing of the divorce suit but he failed to do so. Instead he commenced these proceedings here in Malaysia and thus tried to steal a march on the defendant. Even without the benefit of hearing the parties and observing their demeanour I am of the view that the statements of the defendant which she has set out in her affidavits are in all probability true. The blame for the break-up of the marriage must fall on the plaintiff and his mother and sisters.

The plaintiff has not denied the allegations of cruelty which the defendant has made in her affidavits — nor has he denied that his parents are looking for a girl of their own choice to get the plaintiff remarried. The defendant herself cannot now conceive and she says that she has no intention of re-marrying. On this point one cannot be certain for the future as the defendant is young and good-looking but at the moment there appears to be no reason to doubt her word. The plaintiff may want to have a male child (as was stated by the defendant in one of her affidavits as well as in her evidence in the Bombay court) whereas the defendant already has one from her previous marriage. So it is more probable that the plaintiff may get married again and if this should happen then the step-mother situation is likely to be more discomforting for the two girls than that of a step-father situation. As for the defendant's son from her previous marriage the defendant admits that the boy was suffering from epilepsy but has now fully recovered. She says that her son is fond of the two girls and that when she left India for Malaysia recently to contest the present custody case the boy was inquiring if his two sisters would be returning with her from Malaysia. I think there is every reason to believe that the step-brother situation will pose no problem in the family.

As for the deed of separation which the parties executed on January 14, 1980 I am inclined to agree with the defendant's contention that as a result of the mental and physical strain caused on her by the plain-

tiff and his mother and sisters she was not in a proper frame of mind when she signed the deed. The defendant is therefore not bound by any of the provisions contained in the deed. Anyway the deed of separation can have no effect on the jurisdiction of the High Court to hear this custody case nor can it prevent the court from arriving at a decision which may be inconsistent with the clauses in the deed relating to custody and access. The welfare of the children reigns supreme.

The immigration status of the two children is also not conducive to their stay and upbringing in Malaysia. No one can say exactly when the children will be allowed to say here permanently or even if permission for permanent stay will be given at all. The letter from the Home Affairs Ministry which the plaintiff has exhibited merely says that the visit pass of the children will be extended until the custody hearing is over. This uncertainty is bound to affect the children psychologically and emotionally in time to come as they grow up.

From all angles therefore it seems to me that it is in the best interest and welfare of the children that they live with their mother in India. When I talked to them privately in chambers they would not say that they loved their father nor would they say that they disliked or did not love their father. But they were quite sure that they loved their mother and would want to live with her rather than with their father.

The application for custody of the two children is dismissed with costs and I order that the custody of the children be given forthwith to the defendant. The plaintiff will have reasonable access to the children on such terms as the parties may agree.

From the above judgment the plaintiff appealed to the Federal Court.

FEDERAL COURT.

Dr. L. Fernando (*Miss V. Alahkone* with him) for the appellant.

K. Anantham for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): This is an appeal against the decision of Ajaib Singh J. who awarded custody of two female children of a broken marriage, aged 7½ and 8½ years respectively, to the mother. The facts and circumstances leading up to the decision are contained in a lucid and lengthy judgment of the learned judge which we do not feel obliged to repeat. We would like to state at the start that we sympathize with the parent who does not succeed in this appeal. This is one of those things which a parent must face when a marriage breaks up.

We are here dealing with the future of these 2 children. We must therefore consider the reality of the situation which is designed to promote their interests and welfare, and not to demote the claims of either parent.

The learned judge approached the matter by considering the welfare of the children as the first and paramount consideration. The phrase 'first and paramount consideration' does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration. We think that "it connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." (*per* Lord MacDermott in *J. & Anor.* v. *C. & Ors.*[2]).

In arriving at his decision the learned judge has considered what will be in the best interests of the two children and what will be best to promote their welfare and protect their rights. In considering their welfare he has considered, amongst other things, the conduct of the parents in so far as it might indicate their future behaviour, the question whether the children of tender age should be with their father or mother, the situation in Bombay and Malaysia, the wife's apparent ability to spend some long and continuous period with the two children in the immediate future, the present situation where the children are brought up by the father's own family, the confidential reports of the social welfare officer and the firm wishes of the children who want to be with their mother.

Also the learned judge has considered the *status quo* of the children. It is true that this *status quo* was established by the father when the mother left for India in January 1980. The learned judge saw no virtue in preserving the *status quo*.

In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be first and paramount consideration and other considerations must be subordinate. The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare. Consequently, it cannot be right to speak of the pre-eminent position of the parents alone, or their exclusive right to the custody of the children, when their future is being considered by the court. Neither is it right to choose between two unimpeachable parents; we are here considering two households. Nor is it the case that we are confronted with the prospect of bringing to an end the continuity of a situation said to be good for the children. Of the two parents, the mother lives in a family situation, she has a thirteen year old son by a previous marriage and who is the step-brother of the two children and he has established close relationships with the children. She is also their mother and is prepared and able to devote a very long and continuous period to the care of the children. This demonstrates a willingness to face up to the responsibilities of parenthood. The father, on the other hand, will be at work when the children will be left

at home with elderly people and there is no children of their own age group in that household. This is one other factor which has influenced us considerably. The father cannot constantly be present to care for the children and to provide for them. The father can therefore offer, at best, life with himself and his parents, brother and sisters. We are therefore uncertain what will be the relationship which will develop between the children and their elderly relations.

As to continuity, the present situation does not, in any way, encourage us to believe that its continuation can do anything to operate against the welfare of the children.

We are also aware of the damage done to emotional development of children if they are suddenly removed from a known, secure, supporting set of relationships, and thrust among strangers, even if they be some blood relationship with one or more of the strangers. In some cases this may be explored by calling expert evidence; in others, the ordinary experience of the courts is relied upon. But this does not mean that the *status quo* must always be preserved. It merely means that we must anxiously consider the evidence placed before the court and determine how best to promote the interests and welfare of the children. After having done that we are of the opinion that it cannot be but for the children's interests and welfare that they be returned to their mother.

For a judgment of this kind to be reversed by this court, matters must be shown of the kind to which reference has been made in many cases, such as *Teh Eng Kim* v. *Yew Peng Siong.*[3] We are by no means satisfied that the learned judge, in the circumstances of this particular case, was wrong in the sense to which those principles refer, or that he was in default in relation to the kind of considerations referred to in such cases.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Zain & Co.; Skrine & Co.*

KU LIP SEE v. PUBLIC PROSECUTOR

[F.C. (Wan Suleiman Ag. C.J., Syed Othman & Abdul Hamid F.JJ.) September 7 & December 2, 1981]
[Johor Bahru — Federal Court Criminal Reference No. 3 of 1981]

Criminal Law and Procedure — Appeal from subordinate Court heard by High Court — Application for reference of question of law to Federal Court — Evidence in support of alibi — Question not within scope of s. 66(1) of Courts of Judicature Act, 1964 — Criminal Procedure Code (F.M.S. Cap. 6), s. 402A.

The applicant had been charged with rape. At the end of the prosecution case the learned President found that the prosecution had established a *prima facie* case and he called on the applicant to enter on his defence. The defence of the applicant was an outright denial. The learned President acquitted the applicant as he stated he was left in a real state of doubt as to the case for the prosecution and the applicant's guilt. The Public Prosecutor appealed. Yusof Abdul Rashid J. allowed the appeal and held that in the circumstances the order of acquittal must be reversed. — See [1981] 1 M.L.J. 258. The applicant thereupon applied for the following two questions to be reserved for the decision of the Federal Court —

"(1) whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, evidence put forward by the defence to the effect that the accused was unlikely to have been present amounts to the defence of or evidence in support of alibi.

(2) If the answer to the above is in the affirmative then whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, the defence is precluded from adducing evidence tending to show that accused was unlikely to have been present when the crime was committed by reason of his failure to give the required notice under section 402A of the Criminal Procedure Code."

Held: (1) although the charge in this case had not stated when the offence was committed during the months of May and June 1978 it had nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge. The applicant did not put forward any alibi defence, but his defence was in effect a complete denial of the prosecution case. The appellate judge quite rightly treated it as purely a question of fact;

(2) the first question posed in this case therefore was not a question of law within the scope of section 66(1) of the Courts of Judicature Act, 1964. No question of law arose in the course of the appeal and there could not be any question of law that has affected the event of the appeal;

(3) the second question was dependent on the determination of the first question and therefore did not arise.

Semble: If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under section 402A of the Criminal Procedure Code has been given, then the court has no discretion in the matter but to exclude such evidence.

Case referred to:-

(1) *Public Prosecutor* v. *Lim Chen Len* [1981] 2 M.L.J. 41.

FEDERAL COURT.

Teh Poh Teik for the applicant.

John O'Hara (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): This reference under section 66(1) of the Courts of Judicature Act 1964 (Act 91) reserves the following two questions for the decision of the Federal Court:

"(1) whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, evidence put forward by the defence to the effect that the accused was unlikely to have been present amounts to the defence of or evidence in support of alibi.

(2) If the answer to the above is in the affirmative then whether in an offence where the prosecution cannot specifically particularise the time and place when the offence was committed, the defence is precluded from adducing evidence tending to show that accused was unlikely to have been present when the crime was committed by reason of his failure to give the required notice under section 402A of the Criminal Procedure Code."

First the facts:

The applicant Ku Lip See aged 36 was charged in the Sessions Court Johore Bahru for an offence under section 376 of the Penal Code. It was alleged